(17) (15) (17)

Nos. 87-1614, 87-1639, 87-1668

Supreme Court, U.S.
FILED
SEP 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JOHN W. MARTIN, et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents.

RICHARD ARRINGTON, JR., et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Of Counsel

DEBORAH L. GARLIN
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ANTHONY T. CASO
*COUNSEL OF RECORD
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED..... ii

INTEREST OF AMICUS 2

OPINION BELOW..... 3

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THIS CASE IS NOT AN IMPERMISSIBLE COLLATERAL ATTACK ON THE CONSENT DECREE 6

A. The Impermissible Collateral Attack Doctrine Is an Unwarranted Exception to Well-Settled Principles of Res Judicata and Collateral Estoppel 7

B. Due Process Limits the Preclusive Effect of Res Judicata in a Consent Decree Because It Is Not an Adjudication on the Merits 11

II. THE RULE OF MANDATORY INTERVENTION WHICH PETITIONERS ASK THE COURT TO ADOPT IS INVALID UNDER DUE PROCESS 14

III. TITLE VII'S POLICY FAVORING VOLUNTARY SETTLEMENT OF EMPLOYMENT DISCRIMINATION DISPUTES DOES NOT JUSTIFY UNLAWFUL DISCRIMINATION AGAINST EXISTING EMPLOYEES..... 19

CONCLUSION 22

TABLE OF AUTHORITIES CITED

Page

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 19, 20

Ashley v. City of Jackson, 464 U.S. 900 (1983) 7, 8, 11, 12, 22

Corley v. Jackson Police Department, 755 F.2d 1207 (5th Cir. 1985).....8

County of Orange v. Air California, 799 F.2d 535 (9th Cir. 1986).....8

Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986) 8

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 8, 9, 20

Local Number 93 v. City of Cleveland, 478 U.S. 501, 92 L. Ed. 2d 405 (1986) 8, 9, 10, 12, 13

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 18

McDonald v. Santa Fe Trail, 427 U.S. 273 (1976) 19

Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950) 14, 18

Parklane Co., Inc. v. Shore, 439 U.S. 322 (1979).....11

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 8

TABLE OF AUTHORITIES CITED–Continued

Page

United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983) 17, 23

W. R. Grace and Co. v. Rubber Workers, 461 U.S. 757 (1983) 11

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 11

STATUTES

28 U.S.C. § 2072 16

42 U.S.C. § 2000e-5 10

§ 2000e-5(b) 20

§ 2000e-5(f)(1) 16, 20

RULES

Federal Rules of Civil Procedure, Rule 19 ..... 18, 21

Rule 24 ..... *passim*

Supreme Court Rule 36 2

MISCELLANEOUS

Kramer, L., Consent Decrees and the Rights of Third Parties, 87 Mich. L. Rev. (1988) 15, 16

Restatement (Second) of Judgments § 28 (1980) 8

Nos. 87-1614, 87-1639, 87-1668

In The

Supreme Court of the United States

October Term, 1988

JOHN W. MARTIN, et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents.

RICHARD ARRINGTON, JR., et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respecfully submits this brief amicus curiae in support of respondents. Consent to the filing of the brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in other cases which involved employment discrimination issues and supports the rights of all employees to challenge race-conscious employment programs regardless of whether they were established by consent decree or were self-imposed. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in which to view the holding of the Eleventh Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 833 F.2d 1492 (11th Cir. 1987).

STATEMENT OF THE CASE

This case presents the question whether nonminority employees who were neither parties to nor intervenors in an ongoing Title VII action are precluded from challenging race-conscious promotions instituted pursuant to a consent decree. Furthermore, this case raises an issue as to the validity of the impermissible collateral attack doctrine which bars independent third party claims under a theory of mandatory intervention.

This litigation originated in a Title VII employment discrimination action against the City of Birmingham (City) and Jefferson County Personnel Board (Personnel Board). The parties negotiated a settlement which resulted in two proposed consent decrees and thus the plaintiffs' claims against the City were never adjudicated. The consent decrees provided for race-conscious hiring and promotion plans as part of an extensive remedial scheme. Each decree specifically stated that it was not an adjudication or admission of liability by the defendants.

After the District Court entered a provisional order approving the decrees, a fairness hearing was held to consider the objections of interested parties. The fire fighters union filed objections as amicus curiae at that hearing. After the hearing, but prior to final entry of the

consent decree, the union and two individual members moved to intervene pursuant to Federal Rule of Civil Procedure 24(a), on the grounds that the proposed consent decrees would adversely affect their rights. The motion was denied as untimely and, subsequently, on August 18, 1981, the court entered an order approving the decrees.

In affirming the District Court's denial of the motion to intervene, the Eleventh Circuit concluded that the holding was not prejudicial to the white fire fighters because they still had the right to an independent action for unlawful discrimination on their own behalf.

Seven white fire fighters, who were existing employees, brought suit in District Court against the City and Personnel Board alleging that the race-conscious promotions made pursuant to a consent decree violated their Title VII and Fourteenth Amendment rights. Several other City employees who had been denied promotions subsequently brought similar suits against the City and Personnel Board, as did the United States, who was a signatory to the decrees.

Although the City and the Personnel Board admitted making race-conscious certifications pursuant to the terms of the decrees, they contended that the nonparty employees were bound by the consent decrees and that in any case, the challenged promotions were lawful because they had been made pursuant to the decrees.

After several black individuals who were signatories to the consent decree were allowed to intervene as party defendants, the District Court consolidated the several

suits under the caption *In re Birmingham Reverse Discrimination Employment Litigation.*

At the conclusion of plaintiffs' case during trial, the District Court granted the Personnel Board's motion to dismiss, holding that the individual plaintiffs were bound by the consent decrees.

On appeal, the Eleventh Circuit reversed and remanded with instructions that the District Court try the unlawful discrimination claims. The appeals court concluded that the nonparty fire fighters were neither parties nor privies to the consent decrees and that their claims did not accrue until after entry of the consent decree. In holding that the individual fire fighters were not bound by the decrees, the court rejected the impermissible collateral attack doctrine and found that the existing employees' individual claims of unlawful discrimination could not be precluded.

SUMMARY OF ARGUMENT

The question presented by this case is whether nonminority employees who were neither parties to nor intervenors in an ongoing Title VII action are precluded from challenging race-conscious promotions made pursuant to a consent decree in that action. Petitioners, the City of Birmingham, *et al.*, contend that the nonparty employees are barred from "collateral attacks" on the consent decree if they bypassed the opportunity to intervene in the original proceedings. This argument is unpersuasive for several reasons.

First, the impermissible collateral attack doctrine is an unwarranted exception to well-settled preclusion law. It violates due process when persons not party nor privy to an action are bound by the judgment. Second, the City's interpretation of the timeliness requirement of Rule 24 of Federal Rules of Civil Procedure does not provide nonparty employees with a constitutionally adequate opportunity to assert their interests. The mandatory intervention argument does not justify denying nonparties the right to assert claims that arose only *after* entry of the consent decree.

Finally, policies favoring voluntary settlement of discrimination claims do not give employers license to trammel the rights of existing employees. Title VII and the Equal Protection Clause protect *all* persons from unlawful discrimination by a public employer.

The nonminority fire fighters' claims did not even accrue until they were denied promotions pursuant to race-conscious plans established by the consent decree. Therefore, the Eleventh Circuit was correct in holding that the subsequent actions challenging unlawful discrimination were not impermissible collateral attacks.

ARGUMENT

I

THIS CASE IS NOT AN IMPERMISSIBLE COLLATERAL ATTACK ON THE CONSENT DECREE

Petitioners' impermissible collateral attack argument is not persuasive. They contend that the nonminority fire

fighters are barred from challenging the underlying consent decrees in a subsequent suit because they bypassed the opportunity to intervene in the original suit. *See* Brief of Petitioners Richard Arrington, Jr. and City of Birmingham at 20, *et seq.* However, this case can be best characterized, in the words of Justice Rehnquist, as presenting "the question whether a victim of alleged discrimination may have his right to sue totally extinguished by a prior suit to which he was not a party and in which a consent decree was entered before his cause of action even accrued." *Ashley v. City of Jackson*, 464 U.S. 900, 900 (1983) (Rehnquist, J., dissenting from denial of certiorari).

There is no justification, therefore, in well-settled preclusion law or policies favoring settlement of Title VII suits for barring a subsequent suit by a nonparty employee as an impermissible collateral attack. *Id.* at 903.

A. The Impermissible Collateral Attack Doctrine Is an Unwarranted Exception to Well-Settled Principles of Res Judicata and Collateral Estoppel

Several lower courts have developed a rule to preclude subsequent suits by nonminority employees who were neither party nor privy to the underlying Title VII litigation. These courts have held that nonparties to a consent decree are nonetheless bound by the decree and therefore any separate challenge must be dismissed as an impermissible collateral attack. The Eleventh Circuit, however, guided by decisions of this Court, expressly rejected the impermissible collateral attack doctrine as an unwarranted exception to well-settled principles of preclusion law. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987).

Several other circuits have also had second thoughts about the collateral attack doctrine. Both the Seventh and Ninth Circuits, for example, have suggested that they would reconsider their earlier position favoring the rule. *See Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986), and *County of Orange v. Air California*, 799 F.2d 535 (9th Cir. 1986). In addition, one panel of the Fifth Circuit has expressed doubt about the continued applicability of the doctrine. *Corley v. Jackson Police Department*, 755 F.2d 1207 (5th Cir. 1985).

Plaintiffs-respondents are existing employees who were neither parties in nor privy to the original action. *In re Birmingham*, 833 F.2d at 1498. It is a well-settled principle of preclusion law that nonparties to an action are not bound by the judgment. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974). In his persuasive dissenting opinion in *Ashley* Justice Rehnquist notes that this rule can be traced to an 1816 opinion by Chief Justice Marshall. *Ashley v. City of Jackson*, 464 U.S. at 901 (Rehnquist, J., dissenting from denial of certiorari). Res judicata and collateral estoppel only prevent parties to a prior suit from attacking the judgment in a separate action. Restatement (Second) of Judgments § 28 (1980).

These same principles are all the more applicable to a consent decree. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (O'Connor, J., concurring). This Court recently emphasized that nonparties to a consent decree are not bound by it; a consent decree cannot impose duties or obligations on a third party without that person's consent. *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 92 L. Ed. 2d 405, 428 (1986). Moreover, even if a consent decree attempts to dispose of the claims of

third parties, those third parties will not be bound by the terms of the decree unless their interests have been adequately represented. *Id.*

Justice O'Connor noted in her separate concurring opinion in *Stotts*, that innocent third-party employees have the right to participate fully in the settlement process if they are to have any obligations or duties imposed upon them. If the plan affects the promotion opportunities of nonminority employees, those employees must be represented as parties to the decree or they will not be bound by it. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. at 573 n.3 (O'Connor, J., concurring).

The District Court below found that the individual fire fighters were neither parties nor privy to the consent decrees. *See* Appendix to Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (Petitioners' Appendix) at 105a. The Eleventh Circuit agreed, stating that their union's participation as an amicus at the fairness hearing was hardly enough to make the individual fire fighters parties to the decree. *In re Birmingham*, 833 F.2d at 1499.

In addition, the Eleventh Circuit determined, consistent with this Court's decision in *Cleveland*, that timely intervention by the white fire fighters still would not have precluded a subsequent suit. *Cleveland* also involved a public employer and a fire fighters' union. In *Cleveland*, however, the union actually intervened in the action. It presented evidence and had its objections heard at the fairness hearings, but the consent decree was, nonetheless, entered over the union's objections. The *Cleveland* Court found the union could not block the decree by

withholding its consent but the nonminority employees who did not consent to the decree were free to challenge the race-conscious measures established by the decree as violative of their Title VII (42 U.S.C. § 2000e-5) and Fourteenth Amendment rights. "A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Cleveland*, 92 L. Ed. 2d at 428.

This Court's decision in *Cleveland* that intervenors may challenge unlawful discrimination in a separate action should apply with all the more force to those who were neither parties nor privies to the action, such as the white fire fighters in the present case. The Eleventh Circuit was correct therefore in concluding that the nonminority employees had the right to challenge the promotions in a separate action. *In re Birmingham*, 833 F.2d at 1499 n.21.

The City has not identified the precise question presented here. Whether respondents had notice and opportunity to intervene in the action is *not* the issue. This definition of the issue presupposes that it is possible to resolve the claims of all persons who may be affected by the consent decree *prior* to entry of the decrees. However, this is simply not true; the nonparty employees' claims could not have been resolved prior to entry of the consent decree because those claims were based on actions taken pursuant to the terms of the decree.

The nonminority employees' cause of action for unlawful discrimination arose only after entry of the consent decrees. Their Title VII and constitutional claims

accrued only when they were denied promotions on the basis of race-conscious certifications made pursuant to the consent decrees. The nonminority fire fighters did not consent to the terms of the decrees and therefore are not precluded from challenging those decrees subsequently once they became victims of alleged unlawful discrimination.

Respondents' individual rights cannot be bargained away or sacrificed at the will of the employer. A race-conscious plan "cannot justify the discriminatory effect on some individuals because other individuals have approved the plan." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 281 n.8 (1986) (plurality opinion).

The appeals court therefore properly refused to bind the nonminority plaintiffs-respondents to the terms of the consent decree.

B. Due Process Limits the Preclusive Effect of Res Judicata in a Consent Decree Because It Is Not an Adjudication on the Merits

Due process is violated when judgments bind persons who were neither parties nor privies and therefore never had an opportunity to be heard. *Parklane Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979). Moreover, due process concerns are even greater in a consent decree which is not an adjudication on the merits. Because the merits are not fully litigated, nonparties have the right to subsequently challenge the unlawful conduct. *W. R. Grace and Co. v. Rubber Workers*, 461 U.S. 757 (1983).

This principle applies to consent decrees in other contexts as well. For example, as Justice Rehnquist noted in his dissenting opinion in *Ashley*, a consent decree

between the government and a private corporation based on alleged antitrust violations would not preclude a future suit by another corporation. Nonparties have an independent right to bring a private action against the defendant company for conduct that violates antitrust laws. 464 U.S. at 902.

Furthermore, this independent right is not lost just because the challenged conduct may be authorized by the consent decree. Compliance with the decree does not justify dismissal of any subsequent suit. For example, a prisoner subsequently harmed by prison conditions would not be precluded from bringing a suit, even if those conditions were in accord with a prior court decree. Such a decree could not bind a prisoner who did not consent to it. *Ashley*, 464 U.S. at 902 (Rehnquist, J., dissenting from denial of certiorari).

The same reasoning applies equally to a consent decree entered in an employment discrimination proceeding. Although such a decree binds those who consent to it, it "cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree." *Id.* at 902.

The distinction between a consent decree and a court order is important here. "The voluntary nature of a consent decree is its most fundamental characteristic." *Cleveland*, 92 L. Ed. 2d at 423. A consent decree by definition binds only those who consent to it. *Id.* at 524. A court who enters a consent decree does not resolve the underlying action on the merits, even though it must determine that the settlement is fair and reasonable. *Id.* at 423.

In determining that the white fire fighters were not adequately represented and therefore not bound, the court below emphasized several important factors. First, since the City did not defend the initial racial discrimination suit they hardly could have represented the nonminority plaintiffs' interests in the events which led to the entry of the decrees. In addition, the Eleventh Circuit characterized the City's interest as that of a "disinterested stakeholder with respect to the contested promotions."[1] *In re Birmingham*, 833 F.2d at 1499.

The court also noted that the original claim of employment discrimination was not adjudicated on its merits in the District Court prior to entry of the consent decree. Finally, the court noted that the City voluntarily entered into the consent decree. This voluntary settlement of the discrimination claim through the consent decree did not entitle it to bargain away the rights of its existing employees, however. In this respect a consent decree is given no greater weight than a voluntary affirmative action plan. *Cleveland*, 478 U.S. at 517.

Thus the appeals court in *Birmingham* correctly determined that the white fire fighters' subsequent suit was not an impermissible collateral attack on the consent decree.

---

[1] This is an understatement. The Eleventh Circuit did not go far enough; the City of Birmingham was not just a disinterested stakeholder but, more accurately, the alleged wrongdoer in the employment discrimination case.

II

THE RULE OF MANDATORY INTERVENTION WHICH PETITIONERS ASK THE COURT TO ADOPT IS INVALID UNDER DUE PROCESS

Due process requires that the nonparty fire fighters be provided a constitutionally adequate opportunity to assert their interests. *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950). The City's interpretation of Federal Rules of Civil Procedure, Rule 24, however, would not provide the fire fighters with such an opportunity. In fact, the argument the City advances to support its "intervene or be precluded rule" ignores the precise issue presented by this case. It is not enough to ask whether notice and an opportunity to be heard in the original action preclude any subsequent action challenging the decrees. This determination alone does not conclude the analysis.

Notice and opportunity to be heard requirements were *not* satisfied here, but irrespective of whether these requirements were in fact met in this case, petitioners fail to address the particular facts which are highly relevant to resolution of this case. Namely, that the fire fighters simply were not required to intervene. Rule 24 of Federal Rules of Civil Procedure *allows* intervention; it does not compel it.

The City contends that the nonparty employees must intervene in the consent decree proceedings under Federal Rules of Civil Procedure, Rule 24(a), which provides:

> "Upon *timely* application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an *interest* relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter *impair* or impede the applicant's ability to protect that interest, unless the applicant's interest is *adequately represented* by existing parties." (Emphasis added.)

The nonparty fire fighters should have little difficulty in satisfying the *interest* and *impairment* requirements. Nonetheless, for purposes of the present argument, only the timeliness requirement is relevant here. (For an excellent analysis of the timeliness requirement of Rule 24, upon which this argument is based, *see* Kramer, L., *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. ___ (1988), to be published in November. A copy of the article has been lodged with the Court by the author.

The City concludes that intervention under Rule 24 provides the individual fire fighters with a constitutionally adequate opportunity to protect their interests. This conclusion, however, is incorrect. Rule 24 does not require the parties to notify the would be intervenors but instead puts the burden on nonparties to intervene and in addition provides that nonparties' motions to intervene can be denied if "untimely." However, the City's interpretation of the rule means that the nonparty employees can be precluded from a subsequent suit even if the only notice they had of the prior proceeding was published in a newspaper, which was the case here. This is not consistent with due process.

If nonparties are to have some due process protections, Rule 24's timeliness requirement should be applied

as follows: the first step under Rule 24's timeliness requirement is to determine when the nonparty fire fighters knew or should have known their interests were threatened. *See* Kramer, *supra*. The most obvious answer, is that they knew at the time they were actually injured by petitioners, *i.e.*, when they were denied promotions because of race-conscious practices made pursuant to the terms of the decree. They did not acquire an interest until after the entry of the decree, since they could not know ahead of time which employees would actually be affected by the race-conscious hiring and promotions practice. Thus, before the challenged promotions were made, the nonparty fire fighters could not have alleged any injury.

Due process is violated therefore when timeliness is measured before a consent decree is entered. The threat to nonminority employees' interests is too uncertain at that time to impose a "duty" to intervene. The City's argument that the nonparty fire fighters were required to intervene prior to entry of decree cannot withstand scrutiny under this due process analysis.

The next step of Rule 24's timeliness requirement, to be applied consistent with due process, is to determine how much time is reasonable after the nonparty knew or should have known intervention was necessary. To the extent the City's interpretation preempts the applicable statute of limitations, it modifies the substantive rights of the nonparty employees. *See* Kramer, *supra*. Courts are not authorized to modify these rights. *See* 28 U.S.C. § 2072. For example, Rule 24's timeliness requirements cannot shorten the statutorily prescribed limitations period in Title VII (42 U.S.C. § 2000e-5(f)(1)).

The purpose of litigation is to settle the claims of parties only. If the parties prefer to negotiate a settlement rather than fully litigate the case, then such a disposition would reach the desired result also, *i.e.*, to settle the claims. However, it would be a distortion of the legal process for courts or parties to proceed on the basis that other persons' rights should be sacrificed in order to facilitate settlement in the present action.

Moreover, whether the white fire fighters, who are the plaintiffs-respondents in this case, could have intervened is irrelevant under this analysis. After the fire fighters union's motion to intervene was denied as untimely, the individual fire fighters had no reason to believe that they had to intervene or that they would even be allowed to. Furthermore, once the order denying intervention to the union was affirmed by the appeals court the individual fire fighters instituted a separate action pursuant to the appeals court decision which stated that they had an independent right to challenge the illegal conduct after the decrees had been approved. *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983).

In a motion to intervene, prior to entry of the decrees, the nonparty employees could not have alleged any actual injury since the court had not yet approved the decrees. *Id.* at 1518. Because their interests had not yet been adversely affected, their right to assert their claims was not impaired as long as they could bring a subsequent suit. *Id.* at 1518. Thus, the appeals court properly rejected the impermissible collateral attack argument as unjustified to dismiss the subsequent suit by the nonparty employees.

In addition to an adequate opportunity to be heard, notice must also comply with due process requirements. If a consent decree is to bind interested third parties, formal notice is required even if the party knows the proceedings are pending. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. at 314.

The nonparty employees did not receive formal or informative notice; notice was by publication in two newspapers. Petitioners' Appendix 146a. Although the appeals court noted that the union members knew at an early stage that their rights might be adversely affected, they were never formally notified that they must choose between intervening or being bound by the result. *Mullane*, 393 U.S. at 314. Since the individual nonminority employees could not have known with any certainty whether their own interests were adversely affected, it would be foreign to our concept of justice to bind them on a theory of mandatory intervention.

Thus, the collateral attack doctrine must be rejected; it cannot bar subsequent suits on a mandatory intervention theory. In addition, the right to bring a cause of action under Title VII is a property right that cannot be extinguished. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

Intervention under Rule 24 is allowed; it is not mandatory. If the City wanted to be sure that all interested persons are adequately represented in the proceedings it would have had to join them as "indispensable parties" under Rule 19 governing joinder.

Joinder under Federal Rules of Civil Procedure, Rule 19, would make the duty to join interested third persons

mandatory and thus eliminate the need to bar subsequent claims. Joinder would make it the parties' responsibility to see that all interested persons are before the court; it would not shift the responsibility to nonparties, as the City attempts to do. Despite the City's objection to joinder, it nonetheless is a far better alternative than mandatory intervention which places an excessive burden on nonparties.

III

TITLE VII'S POLICY FAVORING VOLUNTARY SETTLEMENT OF EMPLOYMENT DISCRIMINATION DISPUTES DOES NOT JUSTIFY UNLAWFUL DISCRIMINATION AGAINST EXISTING EMPLOYEES

The City contends that voluntary resolution of employment discrimination claims far outweighs any reason for allowing subsequent suits. This conclusion, however, is simply unjustified. Policy favoring settlement is not license for trammeling the rights of nonminority employees.

Moreover, the policy favoring settlement is *not* the only policy in Title VII. Congress has expressed a competing policy. By giving nonminority employees the same right to bring Title VII suits as minorities, Congress intended that the interests of all employees, regardless of race, be protected. *McDonald v. Santa Fe Trail*, 427 U.S. 273, 280 (1976).

The policies favoring settlement are reflected in the procedural requirements of Title VII and the role it creates for the Equal Employment Opportunity Commission (EEOC). *Alexander v. Gardner-Denver Co.*, 415 U.S. 36

(1974). The procedural requirements of Title VII provide the opportunity to settle disputes by "informal methods of conference, conciliation and persuasion" before a plaintiff may file a lawsuit. Title VII § 706(b), 42 U.S.C. § 2000e-5(b).

These requirements, however, pertain only to the period prior to filing of a suit. In the provisions governing the conduct of Title VII suits *after* the action is commenced, only one provision clearly promotes settlement; this provision provides for stays of Title VII suits – or of additional efforts to conciliate. Title VII § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

Congress, however, could have easily adopted certain measures to further the settlement policy after filing of the suit. They did not adopt such postfiling measures, however, and therefore this policy primarily applies to the period before a suit is filed. Consequently, the courts are not authorized to dismiss reverse discrimination suits in order to promote voluntary settlement of employment discrimination claims.

Moreover, the substantive rights of nonminority employees are meaningless if they are denied the opportunity to assert them. "The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees . . . ." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. at 589 n.4 (O'Connor, J., concurring).

The Eleventh Circuit properly considered all of the above concerns in its determination. The Eleventh Circuit's decision successfully attempts to balance carefully

all the competing interests. This Court should acknowledge the need to be more sensitive to nonminority employees who have carried most of the burden of remedying the effects of past discrimination.

If make whole relief were provided only to those who have been victims of actual discrimination, much of the current confusion and conflict in the consent decree context would no longer exist. A decision by this Court to uphold the Eleventh Circuit's opinion would resolve much of the uncertainty that surrounds consent decree proceedings. In addition, steps can be taken to help eliminate many of the concerns expressed by the petitioners.

For example, finality of judgments will not be seriously undermined if this Court upholds the decision below. There are several possible alternatives for courts to explore. The timeliness requirement of Rule 24 could be relaxed to allow intervention at any stage. Another alternative would be to require the parties to join interested third parties under Rule 19.

Employers cannot use consent decrees as a shield against future challenges to illegal unconstitutional hiring and promotion quotas. If parties to consent decrees are immunized from charges of discrimination by nonparties, there is no reason to expect that these employers will impose upon themselves a duty to protect the interests of existing employees.

If parties are reluctant to settle their Title VII claims by consent decree if those actions will be subject to attack, then they are free to litigate the action instead, just as they would have done had a consent decree not been

an acceptable settlement device. The rights of nonminority employees under the Constitution and Title VII cannot be surrendered at the will of their employers.

CONCLUSION

The City's argument must ultimately be rejected. The nonparty fire fighters' suit challenging the race-conscious promotions made after entry of the consent decrees is *not* an impermissible collateral attack. Dismissing the subsequent suits on a theory of mandatory intervention has the unjust consequence of precluding the white employees, who themselves were denied promotions based on race, from ever having their claims heard on the merits. Consent decrees cannot be used as a shield against challenges to illegal and unconstitutional hiring and promotion practices.

The rule that nonparties to a prior proceeding are not bound by the judgment is nearly 200 years old. As Justice Rehnquist noted in his dissenting opinion in *Ashley v. City of Jackson*, 464 U.S. at 901, this principle is part of the "deep-rooted historic tradition" that everyone is entitled to his or her own day in court. *Id.*

The nonparty employees were not required to intervene because their claims did not even accrue until their interests were adversely affected by the challenged promotions made after entry of the consent decrees. Moreover, had they tried to intervene, their attempt would have fared no better than their union's attempted intervention, which was denied as untimely. The Eleventh Circuit noted in affirming the District Court's denial of

intervention that the union members could not have alleged any unlawful discrimination in their motion to intervene because the court had not yet given final approval to the consent decrees. *United States v. Jefferson*, 720 F.2d at 1518. Moreover, the appeals court said that the members could present such a claim after the decrees had been entered by "instituting an independent Title VII suit, asserting the specific violations of their rights." *Id.*

That is exactly what the nonparty employees did; they filed a subsequent suit after they were denied promotions pursuant to race-conscious certifications established by the consent decree. The timeliness requirement of Rule 24 of Federal Rules of Civil Procedure allows intervention, but does *not* compel it. Since the nonparty employees were unable to intervene, their only alternative was to challenge in a separate action the unlawful remedies contained in the consent decree. Pacific Legal Foundation urges that the decision of the Eleventh Circuit be upheld; it is in the public interest that nonparty employees, themselves victims of unlawful discrimination, have the opportunity to prove that their equal protection and Title VII rights have been violated.

DATED: September, 1988.

Respecfully submitted,

Of Counsel

DEBORAH L. GARLIN
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ANTHONY T. CASO
*COUNSEL OF RECORD
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae, Pacific Legal Foundation